No. 15,111

In the

United States Court of Appeals

For the Ninth Circuit

Dick E. Stearns and The D. E. Stearns Company, a partnership composed of Dick E. Stearns and Ellen Belson Stearns,
Appellants-Appellees,

vs.

Tinker & Rasor, a corporation John P. Rasor and Leo H. Tinker,
Appellants-Appellees.

Reply Brief of Tinker & Rasor, John P. Rasor and Leo H. Tinker

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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DEFENDANTS' COUNTERCLAIM FOR DAMAGES

Plaintiffs' Answering Brief (blue covered brief) correctly states, and it agrees with our position, that only one issue is involved in Defendants' appeal from dismissal of their counterclaim, to wit, whether the *fact* of injury has been proved. The *amount* or *extent* of injury may be determined later by an accounting.

This is a suit in equity of the type which normally proceeds in two parts. The first part is a determination of liability. If no liability is shown that is the end of it. If liability is shown, then the second part—a determination of the *amount* or *extent* of

liability—occurs by way of an accounting. In *Sinclair Refining Co. v. Jenkins Petroleum Process Co.,* 289 U.S. 689, 693, 694; 77 L. Ed. 1449, 1454 (1933), the Court stated:

> "There are times when a suit is triable in separate parts, one affecting the right or liability, and the other affecting the measure or recovery. In suits of that order a discovery as to damages will commonly be postponed till the right or liability has been established or declared"

The case at bar is of that type. It is our position that we have established liability, i.e., the fact of injury, and that dismissal of the counterclaim denies us the right to discovery as to damages.

The pertinent facts that have been proved are:

(1) Plaintiffs lease but refuse to sell their holiday detectors; they refuse to sell or rent parts of holiday detectors; and the practical effect of this tie-in policy is to require persons who want parts for Stearns detectors to acquire them only from Stearns (Findings of Fact Nos. 46-55, R. 926-928).

(2) Defendant Tinker & Rasor engages in the sale of any and all parts for holiday detectors as well as in the sale and rental of complete holiday detectors (R. 438, 439).

(3) The sale of parts of holiday detectors is a substantial part of Tinker & Rasor's business, amounting to 10-15% in 1951, which was the last calendar year before the trial (R. 439, 440).

(4) Parts of holiday detectors offered for sale by Tinker & Rasor are shown in Defs' Exhs. W and Y, both of which are in the record as physical exhibits, offered and received in evidence at R. 441, 442.

(5) Although these parts happen to be parts for Tinker & Rasor's detectors, such as Models DS-3 and C-3, many of them could be used for detectors of competitors, such as

Stearns detectors; e.g., electrode pushers, electrodes, batteries and ground wires (R. 441).

(6) None of these or any other parts offered for sale by Tinker & Rasor has, to Mr. Rasor's knowledge, been sold for Stearns detectors (R. 440, 441).

Defendants endeavored to prove why Tinker & Rasor has not been able to sell parts for Stearns detectors, by pointing out (testimony of Rasor at R. 440, 441) that

> "A. Well, I would assume that somebody using a D. E. Stearns holiday detector would be renting it and they certainly would not buy any parts from us for something they don't own."

This testimony was stricken on Plaintiffs' motion "that it was an assumption" (R. 441).

This answer was, indeed, an assumption; it was an inference of one fact from another fact. And it is the *only* inference that can be drawn from the fact that the D. E. Stearns Co. unlawfully ties patented equipment with unpatented equipment; that it refuses to sell; that it will lease only complete detectors; that Tinker & Rasor engage in a very substantial parts business which could supply parts for Stearns detectors; but that Tinker & Rasor has never, to Mr. Rasor's knowledge, been able to sell parts for Stearns detectors. The only inference that can be drawn—and the inference the District Court should have drawn—is that *Tinker & Rasor has been precluded from the business of selling parts for Stearns detectors because Stearns adheres to an exclusive leasing policy; refuses to sell; and refuses to lease anything except complete detectors.* A tenant will not repair his landlord's house. Neither will a lessee of a Stearns detector purchase replacement parts from Tinker & Rasor. The practical effect is to exclude Stearns detectors from the market for parts. It is as if General Motors were to adopt a policy of leasing rather than selling cars;

it would stifle competition in the lucrative business of supplying parts.

Only the *degree* to which Tinker & Rasor has been precluded from the market for parts for Stearns detectors remains in doubt. The degree should be determined by an accounting. Even if Tinker & Rasor is able to prove only a small sum in damages, it is entitled to recover threefold that sum together with costs of suit including a reasonable attorney's fee (15 U.S.C.A. 15). As pointed out by Chief Justice Warren in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329; 99 L.Ed. 1122, 1128 (1955), vigilant enforcement of the antitrust laws by the instrumentality of the private treble-damage action is in the public interest.

Plaintiffs in the case at bar are adjudged guilty of unlawful conduct in violation of the antitrust laws. It has come to the attention of Defendants' counsel that Plaintiffs have recently seen the light of day; have changed their practice; and now sell their detectors, and even sell the patented combination apart from the apparatus as a whole. Plaintiffs purport to avoid evil in the future, and to avoid punishment for future evil. They also seek to avoid punishment for past evil by upholding the error of the District Court in dismissing Defendants' counterclaim. It is not in the public interest to allow past lawlessness to go unpunished. Defendants should be allowed to enforce the law by their private action for treble damages and costs of suit.

Cases relied upon by Plaintiffs are either distinguishable or support our position. Thus in *Twentieth Century-Fox v. Brookside*, 194 F.2d 846, C.A. 8 (1952), the action was at law and trial was by jury. Hence, liability and the measure of damages had to be proved in one proceeding. The quotation at page 13 of Plaintiffs' Answering Brief significantly omits the language:

> "rather than uncertainty as to amount, and the fact that damages cannot be calculated with mathematical exactness does not make them so uncertain as to bar recovery." (194 F.2d 855)

Suckow v. Borax, 185 F.2d 196, C.A. 9 (1950) is pertinent only at stating the general rule that a private antitrust action is founded upon injury to the plaintiff. In *Triangle Conduit v. National Electric Prods. Corp.,* 152 F.2d 398, C.A. 3 (1945), the plaintiff failed in a private antitrust action because, as to the merchandise involved (bushings for cables), plaintiff's plant could scarcely supply plaintiff's own needs. That is, plaintiff could not have sold bushings for use with defendant's cables because plaintiff required all of its output of bushings for its own cable. In the case at bar, Tinker & Rasor has proved a substantial sale of parts.

In *American Banana Co. v. United Fruit Co.,* 166 Fed. 261, C.A. 2 (1908), plaintiff alleged that defendant kept it (plaintiff) out of the banana trade. The court noted (166 Fed. 264) that preventing a person from engaging in a prospective business is as unlawful as driving him out of an existing business, but the court decided for defendant because plaintiff failed to prove that it ever intended to engage in the banana business. In the case at bar Tinker & Rasor actually engages in the business of selling parts for holiday detectors to whomever wants them, but is prevented from engaging in the business of selling these same parts for Stearns detectors because of Plaintiffs' unlawful conduct.

Plaintiffs' Answering Brief suggests that there could be no injury because of geographical remoteness; because they are located in Shreveport, Louisiana and do business in mainly the Mid-Continent, Gulf Coast and Eastern areas, whereas Defendants operate in Southern California (Plaintiffs' Answering Brief, pages 5, 6 and 11). Thus it is Plaintiffs' contention that the two companies are so remote from one another that what one does cannot affect the other adversely. This is quite inconsistent with paragraphs V and VI of the Complaint (R. 4, 5) stating that Defendants' alleged infringement has damaged Plaintiffs, and it is inconsistent with their prayer for "an accounting for profits and damages" (R. 5, 6). If, by reason of geographic remoteness,

Plaintiffs cannot damage Defendants within the meaning of the antitrust laws, then obviously Defendants cannot damage Plaintiffs within the meaning of the patent laws.

COSTS ON THE FIRST APPEAL

Plaintiffs' Answering Brief, pages 13-16, states and restates the general rule that costs on appeal, including the cost of printing the record of the trial, are taxable against the party losing the appeal. But Plaintiffs overlook or completely sidestep the controlling fact in this case, namely, that the present case is before this Court on a Second Appeal *on the same printed trial record that was before this Court in the First Appeal,* supplemented only by a slender fourth volume. Both Plaintiffs and Defendants joined in a stipulation that the printed record from the First Appeal, Volumes I, II and III be used in this Second Appeal (R. 1022). This was done because there has been only one trial; the record of that trial had already been printed; and to cause the same trial record to be printed again would have been a needless expense and a burden on the facilities of this Court.

Now, it appears, because Defendants were gracious enough to join in a time-saving, money-saving, labor-saving stipulation, Plaintiffs insist that Defendants must pay for almost the entire printed record used in this appeal even though Defendants prevail in the present appeal.

In none of the cases relied upon by Plaintiffs was there a second appeal on the same trial record. Thus, in *Broffe v. Horton,* 173 F.2d 565, C.A. 2 (1949), there was not even a second appeal. In neither *Seeley v. Hunt,* 109 F.2d 595, C.A. 5 (1940) nor *City of Orlando v. Murphy,* 94 F.2d 426, C.A. 5 (1938), does it appear that the same printed record was used in two appeals. In *Troxell v. Delaware L. & W. R. Co.,* 205 Fed. 830, D.C., E.D. Pa. (1913), the first appeal was from an order denying a

pretrial motion. In *Land Oberoesterreich v. Gude,* 93 F.2d 292, C.A. 2 (1937), a new trial was ordered.

This appears to be a case of first impression. Equity demands that the cost of printing the record used in this appeal should be apportioned in the light of this Court's decision of the substantive issues.

CONCLUSION

It is respectfully submitted that Defendants have shown the *fact* of damage; that Par. II of the Judgment of the District Court (R. 934) dismissing Defendants' Counterclaim should be reversed; and that Defendants should be allowed to prove in a separate proceeding the *amount* of damage to them by reason of Plaintiffs' infraction of the antitrust laws.

It is also respectfully submitted that, in the event Defendants prevail in the Second Appeal, Rule 25 of this Court should be construed liberally to apportion the costs equitably between the parties.

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Certificate of Service

Three copies of the within brief were served upon Dick E. Stearns and the D. E. Stearns Company on the .... day of October, 1956 by mailing three copies to H. Calvin White at 611 Wilshire Blvd., Los Angeles 17, California, attorney of record for the said parties, the same being the last address of said H. Calvin White known to the undersigned, such copies being sent through United States mail, postage prepaid.

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